

OGC Has Reviewed



Washington, D.C. 20505

OGC 79-02362
12 March 1979

Keith Raffel
Senate Select Committee on
Intelligence
Washington, D.C. 20510

Dear Keith:

Re: Title IV, CIA Charter

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[redacted] and I enjoyed meeting with you, John Elliff, Mike Epstein, and Dave Shaw on 28 February and believe it was a useful session. In our discussions of the first 28 pages, there were several points on which we agreed to provide suggested language or further justification. This memorandum attempts to accomplish that purpose, as well as to restate several points that seemed to have been accepted and others that were of uncertain status as I reviewed my notes of the meeting.

As I understood the discussion, a new subsection will be included in Section 413 authorizing the Agency to request other entities, such as the FBI in the U.S. as to U.S. persons, to collect foreign intelligence within the authority of their own charters.

Section 413(b)(3) will authorize the Agency to "produce, analyze, publish, and disseminate foreign intelligence necessary to meet the needs of the President, the NSC, the DNI, and other departments and agencies, including national intelligence estimates and similar analyses coordinated with other entities of the Intelligence Community."

Section 413(f)(3) should authorize the Agency to "provide assistance to," in addition to conducting liaison with, foreign governmental agencies, etc. This would empower the Agency to furnish advice, training, etc., to foreign services, but may be unnecessary if the change to 424(2) described below is made. The provision might be better stated in terms of "under the direction of," rather than "as directed by," the DNI.

The reference to the Attorney General in Section 413(g) will be deleted to remove what seems to be an operational role for the AG as will the phrase "determining the necessity for continuing such activities, and." There will be reliance instead upon the DNI annual review, Attorney

General annual review of collection that involves U.S. persons, General Counsel and Inspector General reporting requirements, and the IOB apparatus, as well as managerial responsibility and congressional oversight.

In Section 421(a)(1), the reference to the Director, OMB, will be removed and the following language will read in part, as follows "..., and sums so transferred to or from the Agency may be expended"

The last two clauses of Section 421(a)(5) exempting CIA from the Public Buildings Act of 1959 (40 U.S.C. 601-615), and authorizing CIA to "repair, operate, and maintain" its facilities should be restored. Operational necessities require that the authorities vested solely in the GSA by the Public Buildings Act be granted to CIA since its facilities and operating sites cannot always be acquired in the name of, or identified as owned by, the U.S. Government. Similarly, the detailed prospectus requirements of that act are incompatible with Agency activities in this regard. These authorities were inadvertently stricken to begin with and should have been restored when the first portion of 421(a)(5) (pertaining to rentals and leases) was reinstated. Similar authority now appears in Section 8(a)(1) of the CIA Act of 1949, and NSA would be granted even broader authority in Title VI. In addition to restoring the clauses, it would be helpful to add at the end of this subsection "and lease or purchase, and operate, computer and communications equipment as necessary."

The language of Section 421(a)(7) should be simplified to read "conduct background investigations to determine the suitability of applicants for employment, employees, contractors and their employees, sources of information or assistance, proprietary applicants or employees, and persons similarly associated with the Agency or the office of the DNI."

The meaning of Section 421(a)(10) would be clarified were "in addition to the authority provided under 31 U.S.C. 686, and" to be added at the very beginning of this subsection.

As I understand it, Section 421(a)(11) will be moved to become Section 412(e)(1) and will simply state "protect intelligence sources and methods from unauthorized disclosure."

Section 421(a)(12) will authorize protection of "personnel, installations, equipment, and information, by appropriate means such as access controls and inspections of persons and items entering or leaving."

Add to the citation in Section 421(a)(14) "and 1156 through 1159 of Title 22" to authorize the Agency to provide health care to its employees outside, as well as within, the U.S. Although this authority might be drawn from Section 441(b), that section as written might be construed to only allow payment of benefits, not furnishing of services. Similarly, this provision might be interpreted to be exclusive as to health care authority.

Because of the insufficiency of 22 U.S.C. 1138a, the fact that under this bill not all Agency contractors will be "employees" of the U.S. Government for benefits purposes, and the bars of 31 U.S.C. 638a-c, it appears to be advisable to retain the authority in Section 421(a)(15) simplified as follows "transport, in accordance with regulations approved by the director of the agency, officers, employees, and contractors of the Agency and the office of the DNI, and their dependents, in government-owned or -leased vehicles when transportation is necessary." Similar authority now is provided in Section 8(a) of the CIA Act of 1949 and failure to reenact it may be seen as a denial of the authority to the Agency.

STAT In Section 421(c), the reference to the Appropriations Committee will be deleted, and the entire last sentence may be dropped unless the need for it can be clarified.

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Section 421(f) will be modified to read "neither the Agency nor any officer or employee of the United States may be required to disclose information concerning the organization, function, name, official title, salary or affiliation with the Agency of any person employed by or otherwise associated with the Agency, the number of persons employed by the Agency, or any aspect of the Agency budget."

In addition, it was suggested by Dave Shaw that the modification of this provision to protect certain types of file systems from disclosure is not foreclosed and would be considered further if we supplied suggested language. This language could take one of two forms - a regulatory authority patterned on the Privacy Act and vested in the Director, or a specific description and exemption of certain file systems. As to the former approach, it would require the addition of the following language to Section 421(f):

Further, the Director of the Agency, in order to protect information concerning certain foreign intelligence activities, may promulgate rules to exempt any CIA records from the provisions of Section 552 of Title 5, United States Code. Any rules promulgated pursuant to this section, and any amendment to such rules, shall have the full force and effect of law, shall be deemed to be sufficient authority for exemption from disclosure pursuant to Section 552(b)(3) of Title 5, and shall be furnished to the intelligence committees of the Congress at least 60 days prior to their effective date.

As to the latter approach, the following language would be added instead:

Further, the Agency shall be exempted from provisions of any law that requires the publication or disclosure of information in files specifically designated to relate to the design, function, deployment, exploitation, or utilization of scientific or technical systems

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for the collection of intelligence; special activities and foreign intelligence or counterintelligence activities; investigations conducted to determine the suitability of potential sources or contacts; and intelligence and security liaison arrangements or information exchanges with foreign governments or components thereof.

Both alternatives would be protected by the general "notwithstanding" provision we discussed requiring specific repeal or modification by subsequent statute. We would be happy to discuss this matter further with you at any time and to arrange any meetings for the purpose with persons familiar with these problems.

In Section 421(i)(1), the references to "Chapter 51 and subchapter III of chapter 53 of title 5, United States Code" should be deleted and replaced by the words "any other law" in order to be more complete and to avoid the problems that will arise if and when the cited provisions are repealed and replaced by another law. There should be no problem with, in effect, allowing the Agency to retain the broader exemption since creation of any new positions at or exceeding the pay rates for executive or supergrade levels would be controlled by Section 421(i)(3). In addition, the end of this section should be modified to read "but such compensation shall not exceed the rates authorized for Level I of the Executive Schedule under Section 5312 of Title 5, United States Code," in order to allow the Agency to adopt certain provisions of the Civil Service Reform Act of 1978.

Section 421(i)(2) should be modified, in part, to authorize the Director to terminate "the security clearance of any individual, including contractors of the Agency or any employee of any such contractor, with access to information concerning Agency activities whenever," etc.

Although awkwardly phrased, I believe the following paragraph more clearly represents the meaning of Section 421(i)(3) which is now incomprehensible:

The numbers of positions created within the Agency after the effective date of this title that are to be compensated at a basic salary equivalent to or greater than that provided by the Executive Schedule or General Schedule for grades GS-16 and above shall be as authorized by law, but such numbers of positions shall be additional to the positions of Director of the Agency, the Deputy Director, General Counsel, and Inspector General established under this title and other positions that are transferred to the Agency under Section 451 of this title and compensated at a basic salary equivalent to or greater than that provided by the Executive Schedule or General Schedule (for grades GS-16 and above).

To avoid recurrence of the situation where the Agency must conduct its affairs in conformance with the Armed Services Procurement Act as it existed in 1947 despite intervening amendments, the cite to Title 10 in Section 422(a) should be followed by, "as amended."

Section 422(c) should be modified to provide authority for the Agency to "procure, use, and dispose of property, goods, or services as necessary for the effective performance of its functions in such a manner that the role of the Agency is not apparent or publicly acknowledged under regulations established by the Director of the Agency." Any concern that this authority might enable avoidance of the limits on covert procurement could be alleviated by specifically making this section "subject to" the appropriate provision of Title II.

The second sentence of Section 423(a) should be modified to read "In addition, such proprietaries may be operated to the extent necessary to provide effective cover", and the reference to 31 U.S.C. 484 at the end of the third sentence may be deleted, leaving it to the general "notwithstanding" provision to exempt the Agency from that law.

The second sentence in Section 423(c) will be modified in part to add at the very end ", except for amounts deemed necessary or required by law to be retained for the purpose of satisfying claims or obligations."

In Section 423(d), substitute a reference to the intelligence committees for that to the Comptroller General.

Substitute for Section 423(f) in its entirety "Employees of such proprietaries shall not be considered to be employees of the United States Government or entitled to benefits of any kind accruing to or vesting in employees of the United States Government unless specifically designated in accordance with regulations promulgated by the Director of the Agency."

There should be a revision of Section 424(2) as follows:

to provide and receive technical guidance, training, equipment, and, under regulations established by the Director of the Agency, the services of expert personnel, to or from any other entity of the intelligence community, or, when not available from other federal agencies, to or from other federal, state, and local entities, and foreign governmental entities.

Section 424(5) should be rewritten as follows:

when the Internal Revenue Service is performing an audit of an Agency proprietary or any other organization or individual whose relationship with the Agency is concealed or protected, to notify the Internal Revenue Service of such relationship in order that it not be disclosed publicly as a result of the audit; and

The second sentence in Section 426(a) will be revised in part to read "funds appropriated to the Agency may not be expended unless authorized by legislation enacted during the same or one of the two immediately preceding fiscal years, except"

Modify the beginning of Section 426(c)(1) to read "There is established, and the Director of Agency is authorized to maintain,", and revise the second sentence to read simply "The Director of the Agency is authorized to expend funds from the Reserve Fund for the payment of expenses incurred in connection with any intelligence activity."

The latter part of Section 426(1)(c) should be revised as follows: "... the President's budget was submitted to the Congress for the fiscal year in which the withdrawal is authorized, and the activities to be funded require protection from disclosure."

Section 426(c)(3) is unnecessary and repeats requirements in (c)(1) and (2).

There should be inserted in Section 426(c)(4) after "by moneys from the Reserve Fund" the words ", except to the extent previously withdrawn funds remain available."

With regard to the suggestion of a general provision identifying certain Agency authorities and stating they shall be available "notwithstanding any other provision of law, and will not be modified, limited, suspended, or superseded by any provision of law enacted after the effective date of this title unless such provision expressly cites the specific section to be so effected" it would seem to be preferable to divide this into two provisions because of the different purposes to be served - one being unencumbered authority, the other clarity as to subsequent law. The following provisions should be provided protection against any but specific subsequent laws:

- Section 412(e)(1): DCI responsibility to protect sources and methods (now 421(a)(11)).

- Section 421(a): General Agency authorities.

- Section 421(d): "Cover" authority.
- Section 421(f): Protective authority for the organization, employees, etc.
- Section 421(i) (1), (2) and (4): Personnel authorities.
- Section 422: Procurement authorities, but note that a repeal and revision of the chapters of Title 10 (the Armed Services Procurement Act of 1947) cited in (b) is now underway and that subsection may have to be amended to take account of the subsequent enactment of the bill.
- Section 423: Proprietary authorities.
- Section 426: Expenditure authorities.
- Section 441, 442: Allowances and retirement authorities.

The following, more limited number of provisions should be grouped under a general statement that they may be exercised "notwithstanding any other provisions of law" (because certain of these provisions are self-limiting, it may be necessary to include a qualification to that effect):

- Section 412(e) (1): DCI responsibility to protect sources and methods (now 421(a) (11)).
- Section 421(a) (1): Transfers and receipt of funds by the Agency (this would allow deletion of the last clause).
- Section 421(a) (2): Authority to exchange funds (if the statutory reference is eliminated there may be a need to expand the language to clarify the meaning of "exchange funds").
- Section 421(a) (5): Rent, lease, construct, buy buildings and equipment.
- Section 421(a) (6): Printing authority.
- Section 421(a) (15): Transportation authority.
- Section 421(b): Transfer and receipt of funds by other entities (companion to 421(a) (1)).
- Section 421(c): Detailees, etc.
- Section 421(d): "Cover."
- Section 421(f): Protective authority for the organization, employees, etc.

- Section 421(i)(1), (2), and (4): Personnel authorities.

✓ - Section 422: Procurement authority (except as otherwise noted in 422(f)).

✓ - Section 423: Proprietary authorities (except as noted in 423 itself).

- Section 426: Expenditure authorities.

- Section 441: Allowances authorities.

We, of course, would be happy to meet with you again to discuss these matters and would appreciate being informed as to your disposition of the points raised.

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cc: OLC

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